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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/698,922	10/31/2003	Rick A. Barker	BAR18 P-300	2999

277 7590 07/03/2006

PRICE HENEVELD COOPER DEWITT & LITTON, LLP  
695 KENMOOR, S.E.  
P O BOX 2567  
GRAND RAPIDS, MI 49501

EXAMINER

PELHAM, JOSEPH MOORE

ART UNIT	PAPER NUMBER
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3742

DATE MAILED: 07/03/2006

Please find below and/or attached an Office communication concerning this application or proceeding.

## Office Action Summary

Application No.

10/698,922

Applicant(s)

BARKER, RICK A.

Examiner

Joseph M. Pelham

Art Unit

3742

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --  
Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

### Status

- 1) ☐ Responsive to communication(s) filed on \_\_\_\_.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

### Disposition of Claims

- 4) ☒ Claim(s) 1-29 is/are pending in the application.  
4a) Of the above claim(s) \_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-4 and 10-29 is/are rejected.
- 7) ☒ Claim(s) 5-9 is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_ are subject to restriction and/or election requirement.

### Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

### Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).  
a) ☐ All b) ☐ Some \* c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
  - ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_.
  - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

### Attachment(s)

- |  |   |
|--|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892)  | 4) <input type="checkbox"/> Interview Summary (PTO-413)<br>Paper No(s)/Mail Date. ____. |
| 2) <input type="checkbox"/> Notice of Draftperson's Patent Drawing Review (PTO-948)  | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152)             |
| 3) <input checked="" type="checkbox"/> Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)<br>Paper No(s)/Mail Date <u>2/18/04</u> . | 6) <input type="checkbox"/> Other: ____.  |

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***Claim Rejections - 35 USC § 112***

Claims 10-13 and 15-29 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

Claim 13, lines 2-3 recites a "heater... without a fan, such that heated air... flows... solely through convection." Applicant evidently contemplates "natural convection," by as distinguished from "forced convection," which utilizes mechanical air movement. Both transfer heat energy by means of "convection," however, and the claim should therefore recite specifically "natural convection."

Claim 15 recites "stacking the loaves," when Applicant evidently intends that the step be "standing the loaves," since the loaves could not easily be "stacked" one on another.

***Claim Rejections - 35 USC § 102***

Claims 1 and 2 are rejected under 35 U.S.C. 102(b) as being anticipated by US Pat. 1745518.

The Examiner notes that a recitation of the intended use of the claimed invention must result in a structural difference between the claimed invention and the prior art in order to patentably distinguish the claimed invention from the prior art. If the prior art structure is capable of performing the intended use, then it meets the claim.

Referring to Figs. 1-3 especially, page 1, lines 54-63, and page 2, lines 10-17, US'518 discloses a merchandiser comprising a rack which is open when lid 8 is open, rear, front, and side walls, a bottom 12 with openings 26 permitting air flow therethrough, a base 5 resting on the floor and both supporting the rack and forming a closed interior therewith (beneath bottom 12), a heater 22 heating air that flows up through the openings 26. Heater 22 would appear prima facie to supply air at temperatures between 90-100 degrees F. US'518 is clearly capable of holding vertically standing loaves of bread.

Claims 1-4 are rejected under 35 U.S.C. 102(e) as being anticipated by US Pat. 7012218.

Referring to Figs. 1 and 2, and col. 2, line 55, through col. 3, line 35, US'218 discloses a merchandiser comprising an open rack, rear 16, and side walls, a front wall height 12 substantially less than the rear wall height, a bottom having generally horizontally extending portions 26, 27, 28 with an opening permitting air flow therethrough, a base 14, 48 resting on the floor and both supporting the rack and forming a closed interior therewith (beneath bottom stepped bottom), a heater 22 heating air that flows up through the openings 26. Heater 22 would appear to be capable of supplying air at temperatures between 90-100 degrees. The bottom wall is constructed from a plurality of "slats" (26a, 26b, 26c). US'218 is clearly capable of holding vertically standing loaves of bread.

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Claims 1 and 2 are rejected under 35 U.S.C. 102(b) as being anticipated by US Pat. 4827107.

Referring to Figs. 3, 5, 10, & 12, and col. 4, lines 11-40, US'107 discloses a "rack" with vertical rear, front, and side walls, resistance heater 41, a bottom with an opening 45 permitting air flow therethrough, such that bread loaves can be placed therein to stand side-by-side, a base 32 supporting the rack and containing heater 41. Since US'107 is intended to retain warm eating temperatures, the interior appears inherently capable of being heated to 90-100 degrees F.

***Allowable Subject Matter***

Claims 5-9 are objected to as being dependent upon a rejected base claim, but would be allowable if rewritten in independent form including all of the limitations of the base claim and any intervening claims.

Claims 10-14 would be allowable if rewritten to overcome the rejection(s) under 35 U.S.C. 112, 2nd paragraph, set forth in this Office action and to include all of the limitations of the base claim and any intervening claims.


Claims 15-29 would be allowable if rewritten or amended to overcome the rejection(s) under 35 U.S.C. 112, 2nd paragraph, set forth in this Office action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Joseph M. Pelham whose telephone number is 571-272-4786. The examiner can normally be reached on M-F 8:30 AM to 5:00 PM.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Robin Evans can be reached on 571-272-4777. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

6/19/06

  
JOSEPH PELHAM  
EXAMINER